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Introduction

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The federal Alternative Dispute Resolution Act of 1998 and legislation or rules in most states authorize courts to require participation in mediation.[1] The primary split among jurisdictions, therefore, is not on *whether* but *how* court-compelled mediation should occur.[2] Meanwhile, scholars have focused largely on the debate as to whether courts should require participation in mediation.[3] The resulting commentary has provided

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[1] *See* Alternative Dispute Resolution Act of 1998, 28 U.S.C.A. § 652 (West Supp. 1999); NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY & PRACTICE, app. B (2d ed. 1994 & Supp. 1998) (listing over 40 states in which mandatory mediation is authorized for courts or agencies).

[2] The dispute resolution of the five courts involved in this project could identify several of the models listed in the text in some of their courts.

[3] *See, e.g.*, Thomas Eisele, *Mandatory v. Non-Mandatory Court-Annexed ADR, in* DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES 268 (Stephen B. Goldberg et al. eds., 2d ed. 1992); Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487 (1989); Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 1; Andreas Nelle, *Making Mediation Mandatory: A Proposed Framework*, 7 OHIO ST. J. ON DISP. RESOL. 287 (1992); Frank E.A. Sander et al., *Judicial (Mis)use of ADR? A Debate*, 27 U. TOL. L. REV. 885 (1996); Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079 (1993); Society for Professionals in Dispute Resolution, *Mandated Participation and Settlement Coercion: Dispute Resolution As It Relates to the Courts*, ARBITRATION J., Mar. 1991, at 38.

little guidance on the best structures for mandatory mediation.[4] This symposium and an ongoing inquiry[5] will help fill that gap.

The courts have structured their compulsory referrals in ways that reflect differing answers to the following questions: Should the courts require parties not only to participate but also to pay for the mediation or should the courts handle fees for mediation as they do other required events in the court process? Should courts refer cases only to court-employed mediators or also to individuals or agencies with which they contract? Should the courts rely on volunteer mediators?

The answers to these questions, together with the resources of the court, determine the structure chosen by the court. The Dispute Resolution Committee of the Supreme Court of Ohio, through its dispute resolution coordinator, invited dispute resolution coordinators from the Colorado, Georgia, Hawai'i, and Maine Supreme Courts, working with the Western Justice Foundation, to jointly lead an inquiry regarding the effects of picking a particular structure. Each state had court mediation program structures based on different answers to the questions above. This five-state inquiry led the coordinators to identify five common structures for court-referred mediation:

1. The court refers the parties to court-employed mediators and charges the parties either nothing or a nominal fee;
2. The court refers the parties to nonprofit mediation programs under contract with the courts and charges the parties either nothing or a nominal fee;
3. The court refers the parties to a pool of private mediators paid by the court and charges the parties either nothing or a nominal fee;
4. The court refers the parties to a pool of private mediators and directs the parties to pay the mediators; or
5. The court refers the parties to volunteer mediators supervised by the court and charges the parties either nothing or a nominal fee.

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[4] *See* Craig A. McEwen & Nancy H. Rogers, *Planning Public Sector Mediation Programs: The Role of Statutes and Rules*, NIDR FORUM, Fall 1995, at 14; Society for Professionals in Dispute Resolution, *supra* note 3 (recommending against compulsory payment by the parties in mandatory mediation).

[5] The Western Justice Foundation has pursued funding for an empirical study of aspects of the alternative structures for mandatory mediation.

Despite these variations among programs, only a few policy papers have taken a stance on the structure of court-connected mediation programs. One, adopted by the Society of Professionals in Dispute Resolution (SPIDR), came out against mandatory programs compelling party payment to the mediator except in extraordinary cases (structure number 4 above). The SPIDR Report emphasized the logic of the courts providing all compulsory procedures for the initial filing fee, except in those cases meriting appointment of special masters. In addition, the report warned, "[u]ser fees imposed only on those referred to mandatory processes pose particular problems. If not properly regulated, dispute resolution user fees can result in undesirable coercion to settle for the parties who cannot afford them and in unseemly practices through which the court provides lucrative employment to private providers."[6] Another report, a blue ribbon advisory group writing the Standards for Court-Connected Mediation Programs, adopted the same view regarding the requirement that parties pay private mediation providers.[7]

Assessments of court-referred mediation structures might depend on the vantage point of the assessor. One concerned about maximizing professional opportunities for mediators as the prime value, for example, might lean toward a model that directs the greatest payment to the largest number of persons—the one in which the courts require the parties to pay private providers at their usual hourly rate. A person concerned primarily with fostering community mediation programs, in contrast, would lean toward the model that directs a steady flow of cases and income to these programs. But for lawmakers, the key goals are those of the justice system and the individual parties. The five-state group asked two leading dispute resolution experts, U.S. Magistrate Wayne Brazil and law professor John P. McCrory, to take a particular vantage point and discuss the policy trade-offs of the five common structures identified above. Judge Brazil wrote from the standpoint of the justice system, while Professor McCrory focused on the parties' viewpoints.

Judge Brazil, wearing the justice system glasses, identifies values that weigh mostly, though not entirely, toward a model in which mediators work directly for the court. He emphasizes the importance of the mediators' integrity, not just their effectiveness in helping the parties reach settlement. He also notes that courts should avoid conveying through their

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[6] Society for Professionals in Dispute Resolution, *supra* note 3, at 42–43.

[7] *See* THE INSTITUTE OF JUDICIAL ADMINISTRATION & CENTER FOR DISPUTE SETTLEMENT, NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS § 5.1 (1990).

mediation structure a message that the courts use mediation to get rid of cases. He suggests that direct supervision will best assure no "emotional, informational, or intellectual manipulation" by the mediators in order to achieve settlement. He points out the expense of efforts to regulate private mediators to achieve these ends and questions their likely effectiveness. He also argues the importance of providing mandatory mediation without an additional fee in terms of what the courts wish to "signal" about their support for efforts to achieve settlement. Noting that court-supported mediation models may develop capacity slowly when court resources are thin, Judge Brazil weighs in favor of quality over quantity, in terms of the larger aims of the justice system.

Professor McCrory also supports quality over quantity, but from the viewpoint of the parties' interests. He focuses on quality primarily in terms of a fair process and efficient settlement by the parties. He acknowledges the merits of providing mandatory mediation without charging the parties, but suggests a different course when the choice is party-paid mediation versus no or low quality mediation. When courts do not have the resources to provide a fair mediation process that will lead to efficient settlement, he would prefer to ask the parties to pay rather than lose the availability or quality of mediation, as long as the payment does not interfere with the cost-effectiveness of mediation.

Both writers express frustration about the inadequacy of empirical evidence on matters of importance to their analysis—whether staff mediators become less effective because of their constant exposure to conflict; whether the parties feel more pressure to settle when mediators work within the court structure; whether confidentiality concerns are greater in one mediation model versus the others; the availability of trained and effective volunteer mediators; what will ultimately be the costs imposed on the parties if the courts order them to pay; and how will this affect average resolution costs. The five-state project participants hope to stimulate research on these key issues.

Ultimately, however, empirical evidence only improves the chances of determining which values are served. The debate on the priority among these values will remain. If the parties are well served by a particular model, which justice system concerns should block its use? Conversely, if a model effectively achieves justice system aims, when should the parties' goals dictate a different approach? Judge Brazil and Professor McCrory have taken us a substantial distance in making these judgments.